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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TYRONE MILES, Defendant and Appellant.	B284253 (Los Angeles County Super. Ct. No. BA455754)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Modified and Affirmed.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Tyrone Miles of assault with a deadly weapon, a knife (Pen. Code, § 245, subd. (a)(1)),[1] and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). The court found that he had suffered a prior felony conviction for robbery, both as a serious felony (§ 667, subd. (a)) and as a strike. (§§ 667, subds. (a)(1) & (b)-(j), and 1170.12, subd. (b)). The court sentenced him to 11 years in state prison.

On appeal from the judgment of conviction, he contends that the trial court erred (1) in denying his request to represent himself (made after the jury was sworn), (2) in allowing a Deputy Sheriff to testify that the nature of the victim's wound was consistent with having been inflicted by a knife, and (3) in failing to excise the reference to an inherently deadly weapon from the instruction on assault with a deadly weapon. He also contends (4) that the evidence was insufficient to support his conviction of assault with a deadly weapon, (5) that the conviction of assault by means of force likely to produce great bodily injury is an impermissible dual conviction, and (6) that the case must be remanded for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. We conclude that appellants fifth and sixth arguments listed above have merit, but the rest do not. Therefore, we strike the conviction of assault by means of force likely to produce great bodily injury, and remand the case for the trial court to consider whether to strike the section 667, subdivision (a) enhancement. In all other respects, we affirm the judgment.

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[1] All section references are to the Penal Code.

BACKGROUND

Around 9:00 p.m. on March 22, 2017, Marlon Humberto Andino Flores, who was learning English as a second language at Los Angeles City College, was waiting at the Red Line Metro stop at Vermont Avenue and Santa Monica Boulevard in Los Angeles. He heard a fight and approached to see what was happening. When he neared the stairwell, he observed appellant. Appellant appeared angry and acted aggressive as he spoke to Flores. Flores could understand only two words: "look" and "nigga." In an attempt to explain that he was waiting for the Metro, Flores pointed to the clock, which showed the time of the next train. Appellant left his bicycle and came towards Flores, who only had time to turn his face as appellant struck him with a closed fist behind his left ear. Flores did not see anything in appellant's hand. Although he had been punched in the past, Flores had never before felt pain as severe as this. Because of the severe pain, Flores put his hand to his head and realized he was bleeding heavily. Someone gave him napkins to stop the flow, but it "wouldn't stop coming out."

Soon after the attack, Los Angeles County Sheriff's Deputy Kenneth Cianciosi got off the next train that arrived. Flores flagged him down and told him in broken English that he had just been stabbed. Deputies removed appellant from the last train car, and Flores identified him. Flores later told the deputies he believed he was hit with a blunt object.

Horacio Rios, Flores's friend from school, was also on the Metro platform. From about 20 feet away, he saw appellant punch Flores. Rios saw something in appellant's hand; it fell when appellant punched Flores. As it landed, the item sounded "heavy"—heavier than a pen or a lighter. Appellant picked the item up.

After appellant was arrested, Deputy George Perez searched appellant and found a three-inch folding pocket knife hidden against his skin in his rear waistband under several layers of clothing. Appellant was not wearing rings or carrying anything else that was sharp.

Paramedics took Flores to the hospital where he received staples to close the wound. He later returned to have the staples removed. He had pain behind his ear and headaches for 13 days. He had a scar of less than one inch at the time of trial where his hair could no longer grow.

The jury viewed a security video, which showed the attack. In the video, after striking Flores, appellant could be seen bending down to pick something up.

Deputy Cianciosi was the first aid CPR instructor for his bureau, and had observed both knife and "punch" wounds in the past. In his opinion, Flores' wound (depicted in a photograph introduced into evidence as People's Exhibit 2) was not consistent with a punch, but was consistent with a knife. Flores' wound, like most knife wounds, was deeper than it was wide.

Appellant presented no evidence.

DISCUSSION

I. *Faretta Motion*

Appellant contends that the trial court erred in denying his request to represent himself, made after the jury was selected and sworn. His is mistaken.

A. *Proceedings*

1. *First Marsden*[2] *Request*

On May 4, 2017, the first court date after his arraignment, appellant made a *Marsden* motion. The court conducted an in camera hearing. Appellant complained that his attorney "lied" by saying that he was charged with two crimes arising out of the assault and that he had a prior strike conviction, and complained that the evidence was insufficient to prove assault with a deadly weapon. The trial court denied the *Marsden* motion.

2. *Second Marsden Hearing*

On the next court date, May 24, 2017, appellant asked for another hearing concerning his attorney's performance. In the following confidential proceeding, he asked for "somebody else that's trying to help me really prove my innocence," and stated that his attorney "was not trying to help" him. He also complained that his attorney told him that a second witness provided evidence that he stabbed the victim. In open court the court stated that it did not consider appellant to have

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

made a *Marsden* motion, but if it was later deemed one, it was denied because there was no reason to grant it. Because appellant asked for another appointed counsel on the ground his attorney was not doing enough to help him, the proceeding is properly considered a *Marsden* proceeding, despite the trial court's contrary conclusion.

3. *Complaints after Second Marsden Hearing*

In further proceedings in open court on the same date, appellant interrupted and asked if his attorney was "going to present the evidence of what happened, the video and everything," and declared that he had "asked for the medical reports." The court advised appellant to speak to his attorney. Appellant's mother, who was present in court, then stated appellant was innocent, and asked whether appellant had "a right to a witness," because appellant's "brother was with him." The court advised her to discuss the matter with appellant's attorney.

4. *First Pro. Per. Request*

On the next court date, June 8, 2017, defense counsel informed the court that appellant wanted to speak against counsel's advice. Appellant told the court that he "wanted to go pro. per.," and explained that he wanted to fight for himself and believed he was at a disadvantage with his current attorney. The court asked if he would be ready for trial, and appellant said he would "probably need a continuance [to] prepare for the case or whatever." The court asked

why appellant did not raise this issue sooner. Appellant said, "I feel like—I don't know, I just feel like it's not—he's not working with me."

The court warned appellant, "The Supreme Court of our country says that I should let you do this, even if I think it's going to be unfair to you, even if you're going to hurt yourself by doing it, so I'm not going to stop you." The court inquired whether appellant would ask for a continuance, which would impact the prosecution's case, and appellant said, "Yeah." The court explained: "There's a form you'll be given to read that talks about the risks and consequences of representing yourself, including some of things [*sic*] that I may have already mentioned here. Such as experienced opposition. They don't play slow because you're less experienced. The judge doesn't help you because you're less experienced, et cetera, et cetera." The court then gave appellant a pro. per. advisement form to review, initial, and sign. After being given time to review the form, appellant withdrew his *Faretta* request.

5. *Third Marsden Hearing*

At the start of the next court date, June 14, 2017, before counsel finished stating their appearances, and despite the court's caution not to interrupt and to wait his turn, appellant continued to speak: "I actually don't want this man representing me. . . . I didn't want to wait my turn because I feel like this is really an emergency." After counsel were able to state their appearances, the court confirmed that appellant did not want to represent himself (when asked, appellant said, "Well, I

can't represent myself"), and that appellant wanted a new lawyer. Appellant stated: "I don't want to work with this man. I can't work with him, because everything he say[s] doesn't make sense in my favor."

Asked by the court if he "still want[ed] a lawyer, but [was] unhappy with this lawyer," and wanted to give the court additional detail, appellant answered, "Yes." In the confidential *Marsden* hearing, appellant affirmed that he wanted a lawyer, but not the one representing him. Appellant complained: "The witness was my brother, and he is telling me he don't want my brother to come to court." He also complained that his attorney had not gotten medical records to show the nature of Flores's wound. Defense counsel told the court that he did not intend to get the medical records because he believed the "defense is best without the medical records as opposed to with them." Appellant also asked if the knife was being tested. Counsel stated that there was "no blood or other type of matter listed that was found on the knife." The court asked appellant if there was anything else he wanted to discuss, and appellant said, "No." The court did not formally deny the motion, but implicitly did so (no new attorney was appointed), and after the hearing, the attorneys announced ready for trial.

The next day, June 15, 2017, the case was sent to another court for trial and jury selection began.

6. *Fourth Marsden Hearing*

The following day, June 16, 2017, after further voir dire, appellant asked for another *Marsden* hearing. In the confidential

hearing, the court noted that appellant had made several previous *Marsden* requests before a different judge, which had been denied. The court asked appellant what was different about this request for a new lawyer. Appellant made essentially the same complaints as before—he was innocent, and asked whether counsel "was going to test the knife . . . , and if he was to go bring the hospital records and subpoena my brother who was a witness." Counsel stated that he had had an investigator interview a witness; he had spoken to appellant's brother; he was not having the knife tested; and he had asked for the medical records. His opinion was that the "case [was] better off with the absence of the information rather than the added information." The court denied the motion, stating that appellant had made several other *Marsden* motions which had been denied, and that in the court's view defense counsel was "doing a very fine job."

7. *Fifth Marsden Proceeding and Second Pro. Per. Request*

On the next court date, June 19, 2017, after further voir dire, the jury and alternates were selected and sworn. After the swearing, at the end of the morning session, the court observed (outside the jurors' presence): "apparently, [appellant] wants a *Marsden* motion. We just had one on Friday. It is not his right to have a *Marsden* motion over again. That motion is denied."

Appellant then asked, "May I talk to you?" The court instructed him to talk to his attorney. Appellant replied: "He

wouldn't bring in my brother. Can I go pro. per., sir?" The court stated that it would take up the issue after the noon break.

When proceedings resumed, defense counsel informed the court that appellant wanted to represent himself. The following proceedings then occurred:

> "THE COURT: [Appellant], would you like to put anything on the record as to why you would like to go pro. per.?
>
> "[APPELLANT]: I asked him to do a lot of things he haven't do [*sic*]. I am not going to get a fair trial. I don't know why I'm going to trial if I can't get a fair trial.
>
> "THE COURT: Thank you. [¶] The Court will note for the record [appellant] has a right to go pro. per. The request has to be made in a timely manner. The Court will note that we are in trial. The jury has been selected. Witnesses are out in the hallway. I don't feel at this time this is timely.
>
> "The Court will also note for the record [appellant] has made several *Marsden* motions to have new counsel appointed. Apparently, for reasons of his own, has not been satisfied with his counsel. He asked to go pro. per. on those occasions. He chose for whatever reasons not to.

"At this point, he is asking to go pro. per. at this time. It is not legally timely, and that request will be denied."

The jurors then reentered the courtroom, the court pre-instructed, both counsel made their opening statements, and the prosecution called its first witness, Marlon Flores.

Analysis

We have set forth the relevant record at length because it conclusively disposes of appellant's claim that the trial court erred in denying his second request to represent himself.

Having been made after the jury and alternates were sworn (not to mention after five *Marsden* proceedings and a prior abandoned pro. per. request), appellant's second request to represent himself was undeniably untimely. (*People v. Horton* (1995) 11 Cal.4th 1068, 1110 ["In order to invoke the constitutionally mandated unconditional right of self-representation, a defendant must assert that right within a reasonable time prior to trial"].) Nonetheless, appellant contends that he made his second pro. per. request as soon as reasonably possible. According to appellant, he wanted his attorney to call his brother as a witness, and he did know for certain that his attorney did not intend to do so until just before he made his second pro. per. request. But on June 8, 2017, because of his dissatisfaction with counsel, appellant had earlier asked to represent himself, and later abandoned the request. Moreover, after his first request to represent himself, there were three

additional *Marsden* proceedings based on his concerns about his attorney's preparation for trial. These facts alone defeat any notion that it was somehow reasonable for appellant to wait until June 19, 2017, after the jury was sworn, to make a second request for self-representation.

Further, to the extent his June 19, 2017 second request for self representation was motivated by his attorney's decision not to call his brother as a witness, this concern provided no reasonable excuse for delay. At the *Marsden* hearing on June 14, 2017, appellant complained that his attorney was "telling [him] he don't want [the] brother to come to court." Thus, at least five days before the June 19, 2017 pro. per. request, appellant had reason to know that his attorney likely would not be calling his brother to testify. The apparent confirmation of that fact after the jury was sworn did not excuse failing to request self-representation earlier.

Appellant also contends that the request was timely because he did not affirmatively move for a continuance. But he is wrong on the law: to be timely, the request for self-representation must be made a reasonable time prior to trial; if not, the defendant must justify the delay (*People v. Valdez* (2004) 32 Cal.4th 73, 102), and the question whether a continuance is or will be requested is merely a factor for the trial court to consider in exercising its discretion.

"'[T]rial courts confronted with nonconstitutionally based motions for self-representation [must] inquire sua sponte into the reasons behind the request" (*People v. Windham* (1977) 19 Cal.3d 121, 129, fn. 6) and exercise their sound discretion after considering several factors,

including "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Id.* at p. 128.)

Appellant faults the trial court for simply asking for his reasons for his second request for self-representation, and for not making a more specific inquiry into these factors. But the failure to make such an explicit inquiry is not fatal if the record establishes sufficient reasons for the court's exercise of discretion. (*People v. Dent* (2003) 30 Cal.4th 213, 218 ["Even though the trial court denied the request for an improper reason, if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds, we would uphold the trial court's ruling"]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206 ["while the trial court may not have explicitly considered each of the W*indham* factors, there were sufficient reasons on the record to constitute an implicit consideration of these factors"]; *People v. Perez* (1992) 4 Cal.App.4th 893, 904-905 [same.])

Here, the record discloses more than adequate reasons to deny appellant's second request for self-representation—reasons largely apparent to the trial court. First, as for the quality of representation, the court expressly concluded in the *Marsden* hearing on June 16, 2017 that defense counsel was "doing a very fine job." Second, defendant had a "prior proclivity" to attempt to obtain new counsel (there had been five prior *Marsden* proceedings) and he had also abandoned an earlier

request to represent himself. Third, appellant's expressed reasons for his second request were nothing new: he complained that defense counsel had decided not to call appellant's brother as a witness and that he had "asked [defense counsel] to do a lot of things he [did not] do," obviously referring to his repeated complaints that he wanted to have the knife tested for blood and obtain medical records relating to Flores' injury. These issues had already been addressed in prior proceedings, and provided no excuse for not requesting self-representation earlier. Fourth, considering the length and stage of the proceedings, as we have noted, appellant made his second request for self-representation after the swearing of the jury and alternates for trial.

Finally, with respect to the disruption or delay that might reasonably be expected if appellant's request were granted, the record supports the conclusion that to satisfy appellant's concerns the trial might well have been disrupted or delayed. In making his first pro. per. request on June 8, 2017, appellant had expressly informed the court that he would need a continuance if he were to represent himself. Regardless of whether by June 19, 2017 appellant's brother would have been able to timely appear as a witness at trial (he was listed as the only potential witness on the defense witness list), testimony by the brother was only one of appellant's longstanding concerns. He had repeatedly expressed his desire to have the knife tested and to obtain Flores' medical records. At the *Marsden* proceeding on June 16, 2017, appellant's attorney stated that he was not having the knife tested, that he had asked for the medical records, and that his opinion was that the

"case [was] better off with the absence of the information rather than the added information." Given that appellant's request to represent himself was based in part on counsel's refusal to do "a lot of things" appellant had requested, coupled with his express request for a continuance connected with his first pro. per. request on June 8, 2017, it was apparent that the trial could well be disrupted or delayed by a request for a continuance or attempts by appellant to obtain and introduce his desired evidence.

In short, this record amply supports the trial court's denial of appellant's second request for self-representation.

II. *Deputy Cianociosi's Testimony*

At trial, Deputy Cianciosi testified that he was the first aid CPR instructor for his bureau, and that he had observed both knife and "punch" wounds in the past. In his opinion, Flores' wound (depicted in a photograph introduced into evidence as People's Exhibit 2) was not consistent with a punch, but was consistent with a knife, because Flores' wound, like most knife wounds, was deeper than it was wide.

At trial, defense counsel objected to Deputy Cianociosi's opinion testimony on the ground that it lacked foundation. The trial court overruled the objection. On appeal, appellant contends that the court erred, because Deputy Cianociosi gave an improper expert opinion. We disagree, because Deputy Cianociosi properly testified as a lay witness.

We take guidance from three decisions. In the first, *People v. Lewis* (2008) 43 Cal.4th 415 (*Lewis*), a police detective testified that a

shotgun shell had what appeared to be hammer strike marks on the primer. (*Id.* at p. 503.) The court concluded that the detective "properly testified as a lay witness about the significance of the marks on the shotgun shell. [Citation.] His opinion was rationally based on his perception and helpful to an understanding of his testimony (see Evid. Code, § 800), and the subject of his opinion—the significance of marks on the shell primer—was not so far 'beyond [the] common experience' that expert testimony was required (*id.*, § 801)." (*Lewis, supra,* 43 Cal.4th at pp. 503-504.)

Similarly, in *People v. Navarette* (2003) 30 Cal.4th 458 (*Navarette*), the prosecutor elicited testimony from a police sergeant that "certain wounds were inflicted after the victim was either dead or had lost a tremendous amount of blood," and that the victim "had stab wounds 'to the legs[,] to the rectum area.'" (*Id.* at p. 511.) In the context of a claim that the prosecutor had committed misconduct, the court rejected the contention that this was improper expert testimony: "We believe the prosecution laid sufficient foundation for this testimony by eliciting from Sergeant Rosales that he had observed knife wounds on other occasions and was familiar with the amount of blood loss one would expect from a knife wound." (*Ibid.*)

Finally, in *People v. Vernon* (1979) 89 Cal.App.3d 853, 867-868 (*Vernon*), with no foundation as a medical expert, a police officer "testified that based on his experience as a police officer it was his opinion the body had been in the park at least 24 hours when they found it." (*Id.* at p. 867.) The Court of Appeal rejected the contention

that trial defense counsel was incompetent for failing to object: "There was no compelling reason for defense counsel to object to the question, asked by the prosecutor of Officer Burk, as to how long he believed the body had been there. He had stated he had seen a number of bodies exposed to the elements and based his testimony on that experience. He did not claim to be nor was it attempted to show he was a *medical* expert on the causes of death or the time of death. Moreover, he testified as to how long he believed the body had been in the park, not how long it had been dead, mentioning such things as numbers of insects about the body. A lay witness can give an opinion as to something rationally based on his perception. (Evid. Code, § 800.) The testimony being proper, there was no incompetence in failure of counsel to object to it." (*Id.* at pp. 867-868.)

In the present case, as with the police opinion testimony in *Lewis, Navarette,* and *Vernon,* Officer Cianciosi's testimony that Flores' wound was consistent with a knife wound and not one inflicted by a punch was proper lay opinion. Officer Cianciosi did not purport to be a medical expert with special expertise in the causation of wounds. He simply testified that he was the first aid CPR instructor for his bureau, and that he had observed both knife and "punch" wounds in the past. His opinion was based on his own perception—Flores' wound (depicted in a photograph introduced into evidence as People's Exhibit 2) was deeper than it was wide, making it (in his experience) consistent with a knife wound and not a punch. The characteristics of a knife wound—being deeper than wide, obviously because a blade can penetrate deeper than a fist—is not so far beyond common experience as to require expert

testimony, just as the causation of the wounds in *Navarette,* the presence of strike marks on the casings in *Lewis,* and the length of time the body had been present before it was found in *Vernon*, did not require expert qualifications. The trial court did not err in admitting Officer Cianciosi's lay opinion.

III. *Sufficiency of the Evidence*

Appellant contends that the evidence was insufficient to prove that he used a knife in the attack, or, if he did, that the knife was used in a way likely to cause death or great bodily injury, and that therefore it was insufficient to support his conviction of assault with a deadly weapon. We disagree. Of course, we view the evidence in the light most favorable to the judgment, and draw all reasonable inferences in support. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

According to Flores, appellant struck him with a closed fist behind his left ear. Although he had been punched in the past, Flores had never before felt pain as strong as this. The wound bled profusely, and required staples to close. At trial, Flores testified that he was unable to see anything in appellant's hand—he only had time to turn his face before being struck. According to Officer Cianciosi, Flores told him in broken English that he had been stabbed, and later when a Spanish-speaking officer arrived to translate, Flores said that he had been struck by a blunt object.

According to Rios, who was about 20 feet away when the attack occurred, he saw something in appellant's hand, and it fell when appellant punched Flores. As it landed, the item sounded "heavy"—

heavier than a pen or a lighter. As testified by Rios and shown on the video tape, appellant picked the item up. He then boarded a train on which he was shortly afterward apprehended. In a search of appellant after arrest, Deputy Perez found a three-inch folding pocket knife concealed in appellant's rear waistband. Appellant was not wearing rings that might have caused Flores' wound, and he had no other sharp objects. In Deputy Cianciosi's opinion (which, as we have discussed, was properly admitted), because Flores' wound was deeper than it was wide, it was not consistent with a punch, but was consistent with a knife.

Based on this evidence, the jury could reasonably infer that appellant used the three inch pocket knife later found concealed in his waistband to strike Flores. Further, the jury could reasonably conclude that the knife was used in a manner capable of producing or likely to produce great bodily injury or death. (See *People v. Brown* (2012) 210 Cal.App.4th 1, 7 ["a bottle or a pencil, while not deadly per se, may be a deadly weapon within the meaning of section 245, subdivision (a)(1), when used in a manner capable of producing and likely to produce great bodily injury"].) That is, the jurors could infer that the knife was the object Rios saw in appellant's hand: it fell when appellant struck Flores, making a sound heavier than a pen or a lighter, and appellant then picked it up before boarding the train. They could also infer that the knife was the object that caused Flores profound pain (more than a punch) and profuse bleeding, a wound which required staples to close and was deeper that it was wide, consistent with a stab wound and not a punch.

In sum, the evidence is sufficient to prove appellant assaulted Flores with a knife, and was guilty of assault with a deadly weapon. We need not discuss further appellant's arguments to the contrary; they simply deny reasonable inferences and reweigh the evidence.

IV. *Jury Instruction on Inherently Dangerous Weapon*

In the jury instructions, the trial court defined a "deadly weapon" to mean "any object, instrument, or weapon *that is inherently deadly* or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (Italics added.) Because a knife is not an inherently deadly weapon, appellant contends that the court erred in referring to a weapon that is inherently deadly, and that the conviction of assault with a deadly weapon in count 1 must be reversed. We find no reversible error.

The leading decision on the point (although review has been granted) is *People v. Aledamat* (2018) 20 Cal.App.5th 1149 (*Aledamat*), review granted in S248105 (July 5, 2018). We will assume, without deciding, that the court of appeal's reasoning in *Aledamat* was correct. (See Cal. Rules of Court, rule 8.1115(e)(1) ["Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only"].) In any event, there was no reversible error here.

In *Aledamat,* the defendant was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) with personal use of a deadly weapon

(§ 12022, subd. (b)(1)) based on evidence that he "pulled a box cutter out of his pocket and extended the blade; from three or four feet away, defendant thrust the blade at the [victim] at waist level, saying, 'I'll kill you.'" (*Aledamat, supra,* 20 Cal.App.5th at p. 1152.)

As *Aledamat* explained, "For purposes of both assault with a deadly weapon and the enhancement for personal use of a deadly weapon, an object or instrument can be a 'deadly weapon' if it is either (1) 'inherently deadly' (or 'deadly per se' or a 'deadly weapon[] as a matter of law') because it is dangerous or deadly to others in 'the ordinary use for which [it is] designed,' or (2) 'used . . . in a manner' 'capable of' and 'likely to produce death or great bodily injury,' taking into account 'the nature of the object, the manner in which it is used, and all other facts relevant to the issue.' [Citations.] A box cutter is a type of knife, and 'a knife'—because it is designed to cut things and not people— 'is not an inherently dangerous or deadly instrument as a matter of law.' [Citation.]" (*Aledamat, supra*, 20 Cal.App.5th at pp. 1152-1153.)

In *Aledamat,* as here, the trial court gave the jury both definitions, defining "a deadly weapon" as "'any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing or likely to cause death or great bodily injury.'" (*Id.* at p. 1152.) The Court of Appeal held that the trial court erred in referring to "an inherently dangerous [weapon]," because it was inapplicable to the box cutter used by the defendant. (*Id.* at p. 1153.)

The court also held that reversal was required: "When an appellate court determines that a trial court has presented a jury with

two theories supporting a conviction—one *legally* valid and one *legally* invalid—the conviction must be reversed 'absent a basis in the record to find that the verdict was actually based on valid ground.' [Citing *People v. Guito*n (1993) 4 Cal.4th 1116, 1122, 1129.] That basis exists only when the jury has '*actually*' relied upon the valid theory [quoting *People v. Aguilar* (1997) 16 Cal.4th 1023, 1034, italics added, and citing also *People v. Swain* (1996) 12 Cal.4th 593, 607]; absent such proof, the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming. [Citation.]" (*Aledamat, supra*, 20 Cal.App.5th at p. 1153.)

The court distinguished this approach from cases in which "an appellate court determines that a trial court has presented a jury with two legally valid theories supporting a conviction—one *factually* valid (because it is supported by sufficient evidence) and one *factually* invalid (because it is not)," in which case "the conviction must be affirmed unless the 'record affirmatively demonstrates . . . that the jury did in fact rely on the [factually] unsupported ground.' [Citation.]" (*Aledamat, supra*, 20 Cal.App.5th at p. 1153.)

The court "conclud[ed] that the trial court's instruction defining a 'dangerous weapon' to include an 'inherently dangerous' object entails the presentation of a *legally* (rather than *factually*) invalid theory," and that the assault conviction and enhancement finding for assault with a deadly weapon had to be reversed "because there [was] no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a noninherently

dangerous weapon was actually used)." (*Aledamat, supra*, 20 Cal.App.5th at p. 1154.)[3]

In the instant case, it is true that the trial court committed error under the reasoning of *Aledamat.* Although appellant was charged with using a knife, a non-inherently deadly weapon, the trial court defined a "deadly weapon" to include an inherently deadly weapon ("A deadly weapon other than a firearm is any object, instrument, or weapon *that is inherently deadly* or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (Italics added.)

However, unlike *Aledamat,* the record here shows that the jury relied on the legally valid theory that defendant used a knife in such a way as to be capable of causing and likely to cause great bodily injury. Appellant was charged in count 2 with assault by means of force likely to produce great bodily injury. The jury was instructed separately on the elements of that crime, in relevant part: "To prove that the defendant is guilty of the crime of assault by means of force likely to

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[3] The court acknowledged "that the rules regarding prejudice that we apply in this case are arguably in tension with more recent cases, such as *People v. Merritt* (2017) 2 Cal.5th 819, providing that the failure to instruct on the elements of a crime does not require reversal if those omitted elements are 'uncontested' and supported by '"overwhelming evidence."' (*Aledamat, supra*, 20 Cal.App.5th at p. 1154; see *Neder v. United States* (1999) 527 U.S. 1, 17–18.) That test would certainly be satisfied here, where defendant never disputed that the box cutter was being used as a deadly weapon and where the evidence of such use is overwhelming. However, the case law we cite in this case is directly on point and remains binding on us. [Citation.] Any revisiting or reconsideration of this case law is for our Supreme Court, not us." (*Aledamat, supra*, 20 Cal.App.5th at p. 1154.) As already noted, the Supreme Court has granted review.

produce great bodily injury, the People must prove that: [¶] 1. The defendant did an act that by its nature *would directly and probably result in the application of force to a person*; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted he was aware of facts that would lead a reasonable person to realize that his act *by its nature would directly and probably result in the application of force to someone*; AND [¶] 4. When the defendant acted, he had *the present ability to apply force likely to produce great bodily injury to a person*." (Italics added.) The jury was also instructed: "No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."

The evidence was undisputed that in assaulting Flores, defendant inflicted an injury—a wound that caused severe pain, bled profusely, required staples to close, resulted in headaches for 13 days afterwards, and left a scar of less than an inch. On this evidence of how appellant used the knife in committing the assault, the jury convicted him of assault by means of force likely to cause great bodily injury, i.e., in the words of the relevant instruction, an assault that "by its nature would directly and probably result in the application of force to someone," and with "the present ability to apply force likely to produce great bodily injury to a person." Thus, the jury necessarily found that he used the knife (the weapon which formed the basis of the assault with a deadly weapon conviction on count 1) "in a manner 'capable of' and 'likely to

produce . . . great bodily injury,' taking into account 'the nature of the object, the manner in which it is used, and all other facts relevant to the issue.'" (*Aledamat*, *supra,* 20 Cal.App.5th at p. 1153.) Thus, assuming the reasoning of *Aledamat* is correct, any error in including the reference to an inherently deadly weapon does not require reversal of the conviction of assault with a deadly weapon.[4]

V. *Multiple Convictions*

Appellant contends that his conviction of assault by means of force likely to produce great bodily injury in violation of section 245, subdivision (a)(4) on count 2 must be reversed because it is an impermissible dual conviction in relation to the conviction of assault with a deadly weapon in violation of section 245, subdivision (a)(1) on count 1. We agree.

In *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 967 (*Jonathan R.*), the Court of Appeal concluded that sections 245, subdivision (a)(1) and 245, subdivision (a)(4) are separate offenses, but that section 245, subdivision (a)(4) is a necessarily included offense in section 245, subdivision (a)(1), and that therefore the juvenile court's true finding for a violation of section 245, subdivision (a)(4) had to be vacated in light of the additional true finding for a violation of section 245, subdivision (a)(1). The analysis of *Jonathan R.* was criticized by the Court of

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[4] Below, we vacate the conviction on count 2 for reasons unrelated to the jury instructions. The vacating of the conviction on other grounds does not affect our conclusion that, based on the jury's verdict on count 2, it necessarily concluded that appellant used the knife in such a way as to be capable of causing and likely to cause great bodily injury.

Appeal in *People v. Brunton* (2018) 23 Cal.App.5th 1097, which held that section 245, subdivisions (a)(1) and (a)(4) define a single offense, and that therefore convictions for both counts cannot stand. The conflict between the two cases involves the interpretation and application of section 954 to multiple convictions for violating different subsections of section 245, subdivision (a).

We need not enter the debate on which analysis is correct. Regardless, the result is the same in the present case, and no practical reason requires further discussion: under both decisions, a single act or course of conduct with a single objective cannot support convictions of both subdivisions (a)(1) and (a)(4) of section 245. We therefore vacate appellant's conviction of assault by means of force likely to inflict great bodily injury (§ 245, subd. (a)(4)).

VI. *Remand*

Effective January 1, 2019 (after appellant's sentencing), Senate Bill No. 1393 (SB 1393) deleted former subdivision (b) of section 1385, which precluded the trial court from striking the five-year enhancement for a prior serious felony conviction under section 667, subdivision (a). With the deletion of subdivision (b) of section 1385, the trial court now has discretion to strike a section 667, subdivision (a) enhancement. At the time of appellant's sentencing, the trial court had no such discretion.

Because appellant's case is not yet final on appeal, the parties agree, as do we, that the amendment applies to appellant's case. The

question is whether a remand is required. In the analogous situation involving the enactment of SB 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

Respondent contends that the trial court's denial of appellant's motion to strike his prior strike conviction clearly indicates that a remand would be futile. It is true that the trial court found that appellant did not fall outside the spirit of the Three Strikes law. The court noted that appellant's relative youth (he was 19-years-old) was a factor in his favor, but the court concluded that that factor was outweighed by the fact that his strike was recent, he was on probation, and he had prior juvenile sustained petitions for crimes involving violence. However, although the court declined to strike the strike conviction, it did not impose the upper term of 4 years for the current conviction of assault with a deadly weapon, but rather imposed the middle term of 3 years (doubled to 6 years under the Three Strikes law), to which it added the 5-year enhancement under section 667, subdivision (a), for a total term of 11 years. Under these circumstances, the denial of appellant's motion to strike his strike conviction is not

sufficient to demonstrate that it would be futile to remand the case for the court to exercise its newly enacted discretion whether to strike the section 667, subdivision (a) enhancement, and, if the court elects to exercise that discretion, to thereafter restructure the sentence (not to exceed the original sentence). On this record, therefore, we conclude that the record does not clearly indicate that a remand would be futile.

DISPOSITION

The conviction of assault by means of force likely to produce great bodily injury on count 2 is vacated. The case is remanded for the trial court to decide whether to exercise its discretion to strike the section 667, subdivision (a) enhancement as to the remaining conviction of assault with a deadly weapon on count 1 and, if the court chooses to exercise such discretion, whether to restructure the sentence (not to exceed the original sentence). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J. MICON, J.*

*Judge of the Los Angeles County Superior, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.